Austin Knudsen
Montana Attorney General
Thane Johnson
Michael D. Russell
Alwyn Lansing
Levi R. Roadman
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
thane.johnson@mt.gov
michael.russell@mt.gov
alwyn.lansing@mt.gov
levi.roadman@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com
Attorneys for Defendants

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA; et al., Plaintiffs, v. STATE OF MONTANA; et al., Defendants.	Cause No.: ADV 2023–231 Honorable Mike Menahan **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

The State of Montana seeks to protect unborn children from a single specific abortion procedure—one that entails ripping a live fetus limb-from-limb from the mother's womb.[1] The

[1] Governor Gianforte signed HB 721 on May 16, 2023. Plaintiffs' pleadings related to the HB 721 challenge are infirm because the Court lacks subject matter jurisdiction to adjudicate challenges to a bill that is not yet let. Plaintiffs

State has determined that this "brutal and inhumane procedure" will "coarsen society to . . . vulnerable and innocent human life," and the Montana Constitution permits the State to prohibit the procedure in light of this judgment. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Plaintiffs argue that Montana's Dismemberment Law infringes upon the fundamental right to pre-viability abortion. But like the federal statute in *Gonzales*, the Dismemberment Law does not prevent a single woman from having an abortion. Instead, it prohibits a barbaric procedure that causes grievous pain to the unborn child and has substantial health risks for the mother. Because the Dismemberment Law does not infringe on the constitutional right to privacy, this Court should deny Plaintiffs' motion for a temporary restraining order.

STATEMENT OF FACTS

I. The D&E Procedure

Dilation and evacuation (D&E) is a method of abortion used during the second trimester of pregnancy. Warren M. Hern, *Abortion Practice* 123 (1984). During the first trimester and the early part of the second trimester, doctors perform surgical abortion using aspiration (i.e., suction). *Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care 135, 171* (Maureen Paul, E. Steve Lichtenberg, Lynn Borgatta, David A. Grimes, Phillip G. Stubblefield & Mitchell D. Creinin, eds., 2009). But after 16 weeks of pregnancy, aspiration abortion is no longer feasible because the fetus is too large to be removed from the uterus using suction alone. *Id.* at 171. Consequently, some physicians use the D&E procedure to remove the fetus by dismembering it and removing each part individually. *Id.* at 172.

A D&E abortion is normally performed as a two-day procedure. Patricia A. Lohr, *Surgical Abortion in the Second Trimester*, 16 Reproductive Health Matters 151, 153 (2008). At least 24 to

have not amended their pleading following the enactment of HB 721. Defendants preserve all arguments related to this Court's subject matter jurisdiction to adjudicate Plaintiffs' challenges to HB 721.

48 hours in advance of the procedure, the doctor will use osmotic dilators to dilate the cervix in preparation for the procedure. *Management of Unintended and Abnormal Pregnancy*, *supra* at 160–61. Before the insertion, the doctor may administer either a local anesthetic to the cervix, or the doctor may place the woman under full cervical anesthesia. *Id.* at 161. The doctor then uses a speculum to open the woman's vagina. *Id.* The doctor next inserts an osmotic dilator (most commonly laminaria, a type of seaweed that expands as it absorbs fluid) into the woman's cervix. *Id.* As the laminaria expands, it gradually dilates the woman's cervix. *Id.* The woman may go home overnight and return to the hospital or ambulatory surgical center the next day for the abortion procedure. *Id.* at 162. The woman may require insertion of additional laminaria to achieve the dilation necessary for a D&E procedure, and the doctor may place additional sets of dilators into the cervix between the initial insertion and the performance of the procedure. *Id.* at 163–64.

On the second day, the doctor will administer anesthesia and remove the laminaria, either by hand or by inserting a weighted speculum into the woman's vagina and then using forceps to remove the laminaria. *Id.* at 153. Next, the doctor may use a probe to open the cervix further. *Dilation and Evacuation*, University of Michigan Medicine (Sep. 5, 2018), https://www.uofmhealth.org/health-library/tw2462. The doctor will then use a cannula connected to a suction machine to remove the amniotic fluid surrounding the fetus from the uterus. Hern, *supra* at 149. The physician then uses metal forceps with teeth to reach into the uterus, grasp some part of the fetus, tear it off, and remove it from the woman's body. In this manner, the doctor removes the arms, legs, and torso piece-by-piece from the uterus. As it is torn limb from limb, the fetus bleeds to death. *Stenberg v. Carhart*, 530 U.S. 914, 958-59 (2000) (Kennedy, J., dissenting).

The fetus's skull, however, is too large for the doctor to remove in one piece. Hern, *supra* at 151. The doctor must instead use the forceps to grasp the skull and crush it. The physician knows

the skull has been crushed when a white substance, the fetus's brain, leaks out of the cervix. Hern, *supra* at 142–43. The doctor can then remove the skull in pieces. Hern, *supra* at 151. Finally, the doctor removes the placenta and any remaining fetal parts and may explore the uterus with a curette to ensure all pieces and tissues have been removed. *Management of Unintended and Abnormal Pregnancy*, *supra* at 173. Suction may also be used to ensure there is no remaining tissue in the uterus. *Id.*

After the abortion procedure, the doctor must collect the removed fetal parts and put them back together to ensure that no fetal tissue remains inside the woman's uterus. *Id.* at 172–73. If the woman retains fetal tissue that did not pass from the uterus naturally, the doctor must surgically remove that tissue, lest it precipitate a serious infection. *Id.* at 228. Once the doctor has accounted for all the fetal parts and the placenta, the abortion is complete.

Dismemberment abortions and other abortion procedures performed after the first trimester account for "a disproportionate amount of abortion-related morbidity and mortality." E.M. Johnson, *The Reality of Late-Term Abortion Procedures*, Charlotte Lozier Institute, Jan. 20, 2015, at 6. Dismemberment abortions carry inherent risks of infection, bleeding, damage to other genitourinary and gastrointestinal organs, incomplete emptying of the uterus, cervical laceration, and uterine perforation. L. Bartlett et. al., *Risk factors for legal induced abortion-related mortality in the United States*, 103(4), OBSTET. GYNECOL., 729 (2004); C. Hammond, *Recent advances in second trimester abortion: an evidence-based review*, AM. J. OBSTET. GYNECOL. 2009;200(4):347-356; and J. Diedrich et al., Complications of Surgical Abortion, CLIN. OBSTET. GYNECOL. 2009;52(2):205-212.

During the second trimester, the uterus thins and softens significantly, and there is an increased risk of perforating or puncturing the uterine wall with instruments when attempting to

tear the baby's limbs apart or crush his or her skull. Testimony of Anthony Levatino, M.D., Before the Subcomm. on the Constitution and Civil Justice, U.S. House of Representatives (May 23, 2013).

In preparation for the dismemberment abortion procedure, an osmotic dilator along with one or two gauze sponges are inserted into a woman's vagina. Depending on gestational age, several dilators – as many as 10 or 20 laminaria – may need to be inserted at once. Maureen Paul et al., MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY, COMPREHENSIVE ABORTION CARE 162 (Lynn Borgatta et al., eds 2009). Laminaria, the most commonly used dilators, are natural products derived from seaweed and algae, and, therefore, can harbor genital pathogens – even after sterilization. *Id.* at 164. Every type of dilator used in a dismemberment abortion "can migrate into the uterine cavity resulting in ongoing pain, bleeding, or infection." *Id.* at 163.

Inserting these devices as required before a dismemberment abortion also increases the risk that a woman "will experience spontaneous rupture of membranes during or after osmotic dilator insertion," which can lead to infection and fever. *Id.* Insertion can also "traumatiz[e] the cervix" or "creat[e] a false channel"—that is, it can form a hole or fracture in a woman's vaginal or cervical tissue where there should not be one. *Id.*

Between 5 and 20% of women will suffer vasovagal symptoms – fainting, nausea, blurred vision, lightheadedness, cold sweats, weak pulse, a drop in blood pressure, low heart rate, and more – because of the pre-dismemberment abortion dilation procedures. *Id.* at 164. Leaving the 10 to 20 dilators in for multiple days also poses the risk that the woman (and the baby) will contract a serious infection. *Id.* at 163, 165.

Finally, some women suffer anaphylaxis in response to luminaria insertion. *Id.* at 165. Anaphylaxis is "a severe, potentially life-threatening allergic reaction" characterized by vomiting, dizziness, hives, hypotension, airway constriction, and a weak and rapid pulse. *See* Mayo Clinic, Anaphylaxis, https://mayocl.in/2GYVjoL (2019).

II. Safe Alternative Procedures

Several safe alternatives to live D&E abortion are available during the second trimester. A physician may induce labor, causing the woman to deliver the fetus, which, not being viable, will die on its own in the comfort of the arms of either the mother or the medical staff. Alternatively, the physician can use a digoxin or potassium chloride injection to ensure fetal demise before dismembering the fetus and removing it from the woman's uterus.

A. Induction

A physician can safely abort a pregnancy by inducing delivery of a pre-term fetus that will not survive. Doctors induce labor by administering medication either orally, vaginally, transcervically, or sublingually. *Management of Unintended and Abnormal Pregnancy*, *supra* at 181–84. Several different medications are used to induce labor contractions that may last from a few hours to a full day before the fetus is expelled. *Id.* at 181; Lynn Borgatta & Nathalie Kapp, *Labor Induction Abortion in the Second Trimester*, 84 Contraception 4, 5 (2011).

During labor, the woman may receive epidural anesthesia to minimize pain. Michigan Department of Health & Human Services, *Second Trimester Labor Induction Abortion*, https://www.michigan.gov/mdhhs/0,5885,7-339-73971_4909_6437_19077-46297--,00.html. She may also receive additional pain medications and anesthesia if necessary. Juan Vargas & Justin Diedrich, *Second-Trimester Induction of Labor*, 52 Clinical Obstetrics and Gynecology 188, 191–92. In some cases, the doctor may need to remove the placenta surgically, using a curette, as in a

D&C abortion. *Management of Unintended and Abnormal Pregnancy*, *supra* at 186. However, in most cases, the woman will pass the placenta naturally after the fetus. *Id.* Once both the fetus and the placenta have been expelled from the woman's body, the induction procedure is complete.

B. Digoxin or Potassium Chloride Injection

Another safe alternative to a standard, live D&E procedure is to induce fetal demise before removing it from the woman's uterus. This alternative ensures that the fetus is already dead and does not experience pain when it is dismembered. A physician can accomplish fetal demise by injecting digoxin either into the fetus or into the amniotic fluid surrounding the fetus, or by injecting potassium chloride directly into the fetus. The doctor may administer a local anesthetic to numb the woman's abdomen before the injection. Once the doctor confirms both fetal demise and proper dilation of the woman's cervix, the doctor may proceed to dismember the now-dead fetus using the same method as a standard D&E.

Doctors frequently and safely use injections to induce fetal demise in order to avoid violating the federal partial-birth abortion ban. Aileen M. Gariepy et. al., *Transvaginal Administration of Intraamniotic Digoxin Prior to Dilation and Evacuation*, 87 Contraception 76, 76 (2013). Complications from the injection itself (as opposed to the subsequent D&E) are rare and usually minor and do not pose great risk of toxicity or infection to patients. Complications could arise only from a grossly mistaken and rapid injection of potassium chloride into the body of a woman in a very high dose. Finally, there is no evidence that D&Es performed after inducing fetal demise are any more dangerous than D&Es performed on living fetuses.

III. The Montana Dismemberment Law

On May 16, 2023, Montana Governor Greg Gianforte signed House Bill No. 721 (the "Dismemberment Law") into law. The Dismemberment Law prohibits a person from "purposely

or knowingly perform[ing], induc[ing], or attempt[ing] to perform or induce a dismemberment abortion procedure" "[e]xcept in a medical emergency." HB 721 § 3. "Dismemberment abortion" is defined as "a procedure that involves: (a) the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn human being; and (b) dilation of the cervix, insertion of grasping instruments, and removal of disarticulated fetal parts form a living unborn human being." *Id.* § 2(4).

The medical emergency exception applies to "a condition that, on the basis of a physician's good faith clinical judgment, makes a separation procedure performed prior to the ability of the unborn human being to survive outside of the womb with or without artificial support necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function." *Id.* § 2(9)(a). A medical emergency does not include "mental or psychological conditions." *Id.* § 2(9)(b).

Violation of the Dismemberment Law is a felony punishable by a $50,000 fine or five to ten years in prison. *Id.* § 3(2). However, "[a] woman on whom an abortion is performed, induced or attempted . . . may not be prosecuted for a conspiracy to commit a violation of [the Dismemberment Law]." *Id.* § 3(3).

ARGUMENT

Montana statute provides that "[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on

the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Mont. Code Ann. § 27-19-201(1). It further explains that "[i]t is the intent of the legislature that the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." Mont. Code Ann. § 27-19-201(4). Plaintiffs have not met this high standard here.

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Statutes passed by the legislature are presumed to be constitutional under Montana law; to the extent Plaintiffs present a facial challenge, they must demonstrate unconstitutionality in all possible applications of the challenged statute beyond a reasonable doubt. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357; *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566; *Mont. Cannabis Indus. Assn.*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131; *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825.

The Montana Constitution provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. The Montana Supreme Court has held that "Article II, Section 10, protects a woman's right of procreative autonomy—i.e., here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, ¶ 14, 989 P.2d 364. That case was wrongly decided and should be overturned. Regardless, the law at issue here does not implicate the right protected by *Armstrong*, and in any case, it passes strict scrutiny.

A. PLAINTIFFS LACK STANDING.

"Standing is one of several justiciability doctrines which limit Montana courts, like federal courts, to deciding only 'cases and controversies.'" *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80 (citing *Plan Helena, Inc. v. Helena Reg'l. Airport Auth. Bd.*, 2010 MT 26, ¶¶ 6–8, 355 Mont. 142, 226 P.3d 567); *see also* U.S. Const. art. III, § 2; Mont. Const. art. VII, § 4. This language embodies the same limitations as are imposed on federal courts. *Plan Helena, Inc.*, ¶ 6 (citing *Olson v. Dept. of Revenue*, 223 Mont. 464, 469–70, 726 P.2d 1162, 1166 (1986); *Seubert v. Seubert*, 2000 MT 241, ¶ 17, 301 Mont. 382, 13 P.3d 265. Federal precedents are, therefore, persuasive authority for interpreting the justiciability requirements of Article VII, § 4(1) of the Montana Constitution. *Id.* (citing *Armstrong v. State*, 1999 MT 261, ¶¶ 6–13, 296 Mont. 361, 989 P.2d 364).

Standing is a threshold, jurisdictional requirement in every case. *Heffernan*, ¶ 29 (citing *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 19, 312 Mont. 257, 60 P.3d 381). "The parties cannot waive objections to standing . . .[.]" *Id.* (citing J*ones v. Mont. Univ. Sys.,* 2007 MT 82, ¶ 48, 337 Mont. 1, 155 P.3d 1247). "The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Id.* at ¶ 30 (citing *Helena Parents Comm'n. v. Lewis and Clark Cnty. Comm'rs*, 277 Mont. 367, 371, 922 P.2d 1140, 1142 (1996)). Standing is determined as of the time the action is brought. *Id.* (citing *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n. 3 (1st Cir. 2000); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154–55 (10th Cir. 2005)).

There are two strands to standing: the case-or-controversy requirement imposed by the Constitution, and judicially self-imposed prudential limitations. *Id.* at ¶ 31 (citing *Olson*, 223

Mont. at 469–70, 726 P.2d at 1166 (1986); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004). For reasons explained below, it is important to distinguish between these two strands. "'The irreducible constitutional minimum of standing' has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)". *Id.* at ¶ 32 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 103 (1998)). "Beyond these minimum constitutional requirements, the Supreme Court has adopted several prudential limits: the plaintiff generally must assert her own legal rights and interests; the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches; and the plaintiff's complaint must fall within the zone of interests protected by the law invoked." *Id.* (citing *Elk Grove Unified Sch. Dist.*, 542 U.S. at 12). These rules are "closely related to Art. III concerns but essentially matters of judicial self-governance." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)).

"Similarly, in Montana, to meet the constitutional case-or-controversy requirement, the plaintiff must clearly allege a past, present, or threatened injury to a property or civil right." *Id.* at ¶ 33 (citing *Olson*, 223 Mont. at 470, 726 P.2d at 1166; *Bd. of Trustees v. Cut Bank Pioneer Press*, 2007 MT 115, ¶ 15, 337 Mont. 229, 160 P.3d 482). Thus, standing often turns on the source of the plaintiff's claim, since the actual or threatened injury required by the Constitution might exist solely by virtue of statutes creating legal rights. *Id.* at ¶ 35 (citing *Warth*, 422 U.S. at 500). While discretionary limits on the exercise of judicial power "cannot be defined by hard and fast rules," a litigant may only assert his or her own constitutional rights or immunities. *Id.* at ¶ 33 (citing *Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Rev.*, 282 Mont. 255, 260, 937

P.2d 463, 466 (1997); *Jones*, ¶ 48; *In re B.F.*, 2004 MT 61, ¶ 16, 320 Mont. 261, 87 P.3d 427). "But in all events, the standing requirements imposed by the Constitution must always be met." *Id.* at ¶ 34 (citing *In re Vainio*, 284 Mont. 229, 235, 943 P.2d 1282, 1286 (1997) ("The mere fact that a person is entitled to bring an action under a given statute is insufficient to establish standing; the party must allege some past, present or threatened injury which would be alleviated by successfully maintaining the action."); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991)). "The alleged injury must be 'concrete' rather than 'abstract.'" *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 126, 406 P.3d 427, 431 (citation omitted). "Allegations of possible future injury are not sufficient." *Meland v. Weber*, 2 F.4th 838, 844 (9th Cir. 2021) (citation omitted); *see also Advs. for School Trust Lands v. State*, 2022 MT 46, ¶ 26, 408 Mont. 39, 505 P.3d 825.

The Montana Supreme Court has carved out a special exception to this well-settled standing jurisprudence. When the State directly interdicts the normal functioning of the physician-patient relationship by criminalizing certain procedures, abortion providers "have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing." *Armstrong*, ¶¶ 12–13; *see also Weems v. State*, 2019 MT 98, ¶ 12, 395 Mont. 250, 440 P.3d 4 ("when 'governmental regulation directed at health care providers impacts the constitutional rights of women patients,' the providers have standing to challenge the alleged infringement of such rights.") (quoting *Armstrong*, ¶¶ 8–13).

In reliance on *Armstrong* and *Weems*, Plaintiffs bring their claims on behalf of themselves, PPMT's "current and future physicians, physician assistants, advanced practice registered nurses, medical staff, servants, officers, and agents…[,] and on behalf of [their] patients seeking abortions." (Doc. 22 at ¶¶ 16–17.) But the U.S. Supreme Court has "disavowed the theories of

third-party standing that previously allowed doctors to raise patients' claims in abortion cases." *Alliance for Hippocratic Med. v. FDA*, 2023 U.S. App. LEXIS 8898, n.4 (5th Cir. 2023) (citing *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 and n.61 (2022) (comparing *Warth v. Seldin*, 422 U.S. 490, 499 (1975) and *Elk Grove Unified Sch. Dist. v. Newdow* 542 U.S. 1, 15 (2004) with *June Medical*, 140 S. Ct. 2103 (Alito, J. dissenting), *id.* at (Gorsuch, J. dissenting) (collecting cases), and *Whole Woman's Health*, 579 U.S. at 632, n.1 (Thomas, J. dissenting)). In light of this shifting legal landscape, the Court should apply the federal test for third-party standing (also recognized by the Montana Supreme Court), which Plaintiffs cannot meet here.

As a general rule, a plaintiff "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499 (1975); *Baxter Homeowners Assn. v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145. The U.S. Supreme Court has recognized a "limited" exception to this rule, but in order to qualify, a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004); *see also Powers v. Ohio*, 499 U.S. 400, 410–11 (1991); *Baxter*, ¶ 15 (citing *Powers*, 499 U.S. at 410–11). Third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. *Elk Grove Unified Sch. Dist.*, 542 U.S. at 9, 15, and n.7 (2004). Additionally, parties lack a sufficiently "close relationship" with as-yet unknown clients. *Kowalski*, 543 U.S. at 130–31 (attorneys did not have a close relationship with unknown clients); *see also Baxter*, ¶ 15. Even where enforcement of the challenged restriction *against the litigant* would indirectly violate third parties' rights, the plaintiffs must still establish "a close relationship" with the third party, which does not exist with hypothetical clients. *See id.* (emphasis in the original); *Baxter*, ¶ 15.

Plaintiffs have failed to demonstrate sufficient third-party standing in this case. They have neither pled nor argued that they have a "close relationship" to the women for whom they perform direct-to-patient MABs or advanced practice nurse practitioners ("APRNs"), or a hindrance to these individuals' ability to bring suit. (*See generally* Docs. 22 and 24.) "A woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2168 (2020) (Alito, J., dissenting) *abrogated by Dobbs*, 142 S. Ct. at 2275 and n.61. Moreover, "abortionists have a 'financial interest in avoiding burdensome regulations,' while women seeking abortions 'have an interest in the preservation of regulations that protect their health.'" *Id.* Finally, Plaintiffs have no constitutional or fundamental rights to perform abortions or to do so in any manner they desire. They cannot establish a concrete injury in fact sufficient to confer standing. Because they cannot clear this threshold jurisdictional issue, they are not likely to succeed on the merits of their claims, and a preliminary injunction should not issue for this reason alone.

B. *ARMSTRONG* WAS WRONGLY DECIDED AND SHOULD BE OVERTURNED.

Armstrong relied on faulty history to find a non-textual right to abortion much broader than the then-existing federal right that the U.S. Supreme Court rejected in *Dobbs*. The Montana Constitution, which was adopted in 1972, nowhere mentions a right to abortion or "procreative autonomy." While it does specifically protect the "right of individual privacy," Mont. Const. Art. II, § 10, that provision was adopted a year *before* the U.S. Supreme Court held that the federal right to privacy included the right to abortion in *Roe v. Wade*. Critically, that right was historically intended to prohibit government snooping. *See State v. Staker*, 2021 MT 151, ¶ 8, 404 Mont. 307,

489 P.3d 489 ("In general, privacy is the ability to control access to information about oneself." (cleaned up)); *State v. Hoover*, 2017 MT 236, 388 Mont. 533, 402 P.3d 1224.

The Court in *Armstrong* recognized that the constitutional convention did not explicitly address abortion rights: "Significantly, the Convention determined not to deal with abortion in the Bill [Declaration] of Rights 'at this time' and rather chose to leave the matter to the legislature because of the historical debate as to "when a person becomes a person." *Armstrong*, ¶ 44. Indeed, at the time that the Constitution was adopted, Montana criminalized abortion, and the State continued to do so until the U.S. Supreme Court's decision in *Roe*. Mont. Rev. Codes Ann. § 94-401 (1969); *see also Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973).

Nevertheless, the Montana Supreme Court in *Armstrong* ignored the intent of the framers to leave that issue to the people's elected representatives.[2] Instead, it held that the Montana Constitution protects an unfettered right to pre-viability abortion, explaining that "no final boundaries can be drawn around the personal autonomy component of the right of individual privacy." *Id.* at ¶ 38. Because that holding has no grounding in either the text of the Montana Constitution or the State's history and tradition, it should be overturned.

C. REGARDLESS, THE DISMEMBERMENT LAW PASSES MUSTER UNDER *ARMSTRONG*.

The Montana Supreme Court has held that "it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes on that right." *Wiser v. State*, 2006 MT 20, ¶ 15, 331 Mont. 28, 129 P.3d 133. The Dismemberment Law does not implicate *Armstrong* because it does not prohibit pre-viability abortion. The Court

[2] It should be noted that at the time *Armstrong* was decided, abortion had been a "lawful procedure" for 26 years, pursuant to *Roe*, and thus the issue of whether abortion was a "lawful procedure" under existing Montana law was not at issue. Because *Roe* has been overturned—and because not every abortion is a "lawful procedure"—*Armstrong* must be revisited.

in *Armstrong* held that the Montana Constitution protects "the right to seek and to obtain a specific *lawful* medical procedure, a pre-viability abortion, from a health care provider of her choice." *Armstrong*, ¶ 14 (emphasis added). It further explained that strict scrutiny applies only where "legislation *infringe[s]* the exercise of the right." *Id.* at ¶ 34 (emphasis added).

But the Dismemberment Law does not infringe that right at all. Instead, it prohibits a specific *unlawful* procedure but allows women to continue having pre-viability abortions by other methods. The Dismemberment Law prohibits "a procedure that involves . . . dilation of the cervix, insertion of grasping instruments, and removal of disarticulated fetal parts form a *living* unborn human being." HB 721 § 2(4). In other words, Plaintiffs may still perform abortions using alternative procedures that do not dismember the fetus (such as induction of labor) or perform a D&E abortion after fetal demise (by using digoxin or potassium chloride injections).

In *Gonzales v. Carhart*, the Supreme Court determined that states "may … bar certain procedures and substitute others … [to] further[ ] its legitimate interests in regulating the medical profession." 550 U.S. at 158 (2007) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 873–74). Thus, "given the availability of other abortion procedures that are considered to be safe alternatives," *Gonzales v. Carhart*, 550 U.S. at 167, the Dismemberment Law does not implicate the right protected by *Armstrong*.

Regardless, the Dismemberment Law survives strict scrutiny. The Montana Supreme Court explained in *Armstrong* that "legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis—i.e., the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *Armstong*, ¶ 34. For example, "the state . . . may demonstrate a compelling interest in and obligation to legislate or regulate to preserve the safety, health and welfare of a particular class of patients or

the general public from a medically-acknowledged, bona fide health risk." *Id.* at ¶ 59. The State also has compelling interests in the "respect for and preservation of prenatal life at all stages of development," "the elimination of particularly gruesome or barbaric medical procedures," "the preservation of the integrity of the medical profession," and "the mitigation of fetal pain." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022); *see also* Mont. Code Ann. §§ 45-5-102 and 116(3) (including as a "deliberate homicide" the purposeful or knowing causation of the death of "the fetus of another"); Mont. Code Ann. § 45-5-103 ("mitigated deliberate homicide" includes "purposely or knowingly caus[ing] the death of a fetus of another [while] under the influence of extreme mental or emotional stress"); Mont. Code Ann. § 72-38-303(6), ("a parent may represent and bind the parent's minor *or unborn child* if a conservator or guardian for the child has not been appointed") (emphasis added); Mont. Code Ann. § 41-1-103 ("A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.")

D&E procedures use surgical instruments to crush and tear the unborn child apart before removing pieces of the dead child from the womb. These procedures not only inflict grievous pain on the unborn, CHARLOTTE LOZIER INSTITUTE, Factsheet: Science of Fetal Pain, Feb. 19, 2020, they are more invasive and dangerous to the mother because they can cause sepsis, uncontrollable bleeding, infection, chronic pain, and infertility. L. Bartlett et al., Risk factors for legal induced abortion-related mortality in the United States, 103(4), OBSTET. GYNECOL., 729 (2004); C. Hammond, Recent advances in second trimester abortion: an evidence-based review, AM. J. OBSTET. GYNECOL. 2009;200(4):347-356; and J. Diedrich et al., Complications of Surgical Abortion, CLIN. OBSTET. GYNECOL. 2009;52(2):205-212. And such a brutal procedure obviously "confuses the medical, legal, and ethical duties of physicians to preserve and

promote life, as the physician acts directly against the physical life of a child" and "undermines the public's perception of the appropriate role of a physician." Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. 1531 §§ 2(14)(J), 2(14)(K).

Montana "has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of … 'D&E' abortions." *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1320 (11th Cir. 2018). It also "has an interest in protecting the integrity and ethics of the medical profession from being tarnished by participation in gruesome procedures." *Gonzales*, 550 U.S. at 157 (cleaned up). This, of course, includes preventing the infliction of brutal pain unborn children experience during these procedures, limiting increased danger and pain to their mothers, and protecting the medical profession's integrity by "promot[ing] respect for life, including life of the unborn." *Id.* at 158.

The Dismemberment Ban is narrowly tailored to advance those interests. The evidence supporting these interests is sufficient to support a comprehensive state prohibition on abortions in the second trimester. And it is more than sufficient to sustain a lesser abortion limitation, such as HB 721 prescribes. HB 721 is not a gestational limit on abortion. It simply prohibits one particularly gruesome, barbaric, and dangerous procedure. It also does not infringe in any way on a woman's ability to get an abortion in the first trimester when the overwhelming majority of abortions take place. "In 2020, 93% of abortions occurred during the first trimester – that is, at or before 13 weeks of gestation, according to the CDC. An additional 6% occurred between 14 and 20 weeks of pregnancy, and 1% were performed at 21 weeks or more of gestation." J. Diamant & B. Mohammed, What the data says about abortion in the U.S., PEW RESEARCH CENTER, Jan. 11, 2023. Given that less than 7% of abortions are dismemberment abortions, limiting this barbaric, gruesome, and dangerous procedure cannot reasonably been characterized as impeding a woman's

ability to get a pre-viability abortion. This Court should deny Plaintiffs' temporary restraining order because the Dismemberment Ban is narrowly tailored to advance compelling government interests.

II. PLAINTIFFS HAVE NOT MET THE OTHER REQUIREMENTS FOR A TEMPORARY RESTRAINING ORDER.

A. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

Plaintiffs and their patients will suffer no irreparable harm absent an injunction because safe alternative procedures remain available. A physician performing an abortion after fifteen weeks gestation can either induce labor or ensure fetal demise prior to the abortion. Thus, the Dismemberment Law does not interfere with Plaintiffs' patients' constitutional right to privacy. Nor will patients face any risk to their health. The Dismemberment Ban includes an exception for "medical emergenc[ies]." HB 721 § 3. Thus, Plaintiffs will continue to be able to provide abortions safely. "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. Accordingly, neither Plaintiffs nor their patients face an imminent risk of irreparable harm.

B. THE PUBLIC INTEREST AND THE BALANCE OF THE EQUITIES FAVOR THE STATE.

The balance of the equities and the public interest "merge into one factor when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). The public interest contravenes an injunction against the Dismemberment Law because the law protects unborn children from brutal and inhumane procedures and their mothers from the drastic health complications that can result from a D&E abortion. *See Armstrong*, ¶ 59 ("[T]he state . . . may demonstrate a compelling interest in and obligation to legislate or regulate to preserve

the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, bona fide health risk."). And "every citizen of this state is interested in seeing to it that our laws are obeyed." *State ex rel. Steen v. Murray*, 144, Mont. 61, 67, 394 P.2d 761 (1964). Because Plaintiffs will suffer no harm absent an injunction but the State and the public will suffer substantial harm, the balance of the equities weighs against granting Plaintiffs' temporary restraining order.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Plaintiffs' motion for a temporary restraining order.

DATED this 16th day of May, 2023.

Austin Knudsen
MONTANA ATTORNEY GENERAL

Michael D. Russell
Thane Johnson
Alwyn Lansing
Levi R. Roadman
Assistant Attorneys General
PO Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 05-16-2023:

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Austin Knudsen, Montana DPHHS, State of Montana, Charlie Brereton
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Austin Knudsen, Montana DPHHS, State of Montana, Charlie Brereton
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Austin Knudsen, Montana DPHHS, State of Montana, Charlie Brereton
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Austin Knudsen, Montana DPHHS, State of Montana, Charlie Brereton
Service Method: eService

Raphael Jeffrey Carlisle Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
Representing: Planned Parenthood Of Montana, Samuel Dickman
Service Method: eService

Electronically signed by Dia Lang on behalf of Michael D. Russell
Dated: 05-16-2023